

IN THE DISTRICT COURT OF KEYA PAHA COUNTY, NEBRASKA

GARTH D. CARR and DORIS M. CARR,
husband and wife,

Plaintiffs,

vs.

VERNON VAN EPPS and JEAN VAN
EPPS, husband and wife,

Defendants.

Case No. CI00-3

JUDGMENT AND DECREE

DATE OF TRIAL: January 21, 2003.

DATE OF RENDITION: January 21, 2003.

DATE OF ENTRY: See clerk's file-stamp date.

APPEARANCES:

For plaintiffs: Warren R. Arganbright with plaintiffs.

For defendants: W. Gerald O'Kief with defendants.

SUBJECT OF DECREE: Decision on the merits following trial to the court.

PROCEEDINGS: See journal entry previously rendered on January 21, 2003.

FINDINGS: The court finds and concludes that:

1. The plaintiffs assert a cause of action at law for ejectment as to a disputed tract of land of which they are record owners. The defendants resist the plaintiffs' claim by asserting the defenses of adverse possession, mutual recognition and acquiescence, equitable estoppel, and the equitable doctrine of "clean hands." The defendants also counterclaim to quiet title to the disputed tract.

2. The relevant facts are essentially undisputed. Both parties' titles derive from common grantors, Randy Kurzenberger and Karen Kurzenberger. The Kurzenbergers sold the West Half of the Southwest Quarter (W½SW¼) of Section 10 to Lloyd E. Blomstrom

and the East Half of the Southwest Quarter (E½SW¼) of Section 10 to Madeline Thiede, at the end of March, 1989. At that time, the boundary was only partially fenced. Blomstrom and Thiede agreed to extend the existing fence along the same line to the south boundary of the adjoining tracts. The court concludes from the deposition testimony of Mrs. Thiede, as supported by the live testimony of Randy Kurzenberger, that the parties assumed that the fence was placed on the correct line and intended the fence to serve as a boundary fence between the two properties. Neither party obtained a survey. Persuasive testimony shows that the fence was completed relatively quickly, by the end of April, 1989. Both Thiede and Blomstrom (or persons claiming through them) immediately began use up to the division fence. Thiede (or persons claiming through her) used the property east of the fence. Blomstrom (or persons claiming through him) used the property west of the fence. Thiede did not use the property west of the fence. The defendants ultimately succeeded to Blomstrom's title. The same situation continued until Thiede sold her land to the plaintiffs in 1999.

3. In June, 1999, the plaintiffs offered to buy Thiede's land, including the East Half of the Southwest Quarter of Section 10. The written offer and acceptance forming the purchase agreement sets forth the parties' agreement. Exhibit 23. They closed the purchase and acquired title in 2000.

4. The plaintiffs spent considerable time at trial addressing statements made by Randy Kurzenberger, as a real estate agent presenting Madeline Thiede in the sales transaction, to plaintiff Garth Carr. The extent to which Kurzenberger did or did not represent the fence as on the boundary line is disputed in the evidence, but has no real bearing on the outcome of this case. Kurzenberger's participation in the Thiede/Carr transaction does not relate to his status as one of the common grantors and as a participant in the establishment of the fence location. This is not a fraud action against Thiede or her agent Kurzenberger. The defendants bear no responsibility in law or equity for any claims or statements made by Kurzenberger.

5. As an aside, the court observes that the plaintiffs argue that the documents in the Thiede/Carr transaction consistently refer to the entire East Half of the Southwest Quarter. But both the commitment for title insurance (Exhibit 14) and the title insurance policy (Exhibit 15) contain exclusions for “[d]iscrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by public records.”

6. The essential elements of ejectment are: (a) legal estate, (b) a right of possession in the plaintiff, and, (c) unlawful detention by the defendant. *K & K Farming, Inc. v. Federal Intermed. Credit Bank of Omaha*, 237 Neb. 846, 468 N.W.2d 99 (1991). Because the court concludes below that the defendants’ defenses of adverse possession and mutual recognition and acquiescence have merit, the plaintiffs’ ejectment claim must fail.

7. The “clean hands” doctrine simply means that a court of equity will not aid a persons whose conduct connected with the controversy has been unconscientious or unfair. *Shelby v. Platte Valley Pub. Power & Irrig. Dist.*, 134 Neb. 354, 278 N.W.2d 568 (1938). The court will assume that the doctrine may also be asserted as a defense in a law action. *Griffin v. Bankers’ Realty Inv. Co.*, 105 Neb. 419, 181 N.W.2d 169 (1920). This court determines that the doctrine has no application to this case, either as to plaintiffs’ conduct or defendants’ conduct. There is no evidence that the defendants made any misrepresentations to the plaintiffs regarding the fence or otherwise in connection with the sale from Thiede to the plaintiffs. Kurzenberger’s statements are not attributable to the defendants. Plaintiff Garth Carr’s actions in closing the purchase from Thiede after becoming aware of facts raising doubt in his mind regarding the fence location do not constitute the type of conduct covered by the doctrine.

8. Similarly, the defendants’ defense of equitable estoppel lacks merit. Six elements must be satisfied for the doctrine of equitable estoppel to apply: (a) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with,

those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel. *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 648 N.W.2d 319 (2002). Certainly, the defendants did not rely upon the plaintiffs' conduct in any manner or change their position or status by action or inaction. Equitable estoppel finds no application in this case.

9. The establishment of a boundary line between adjacent lots by recognition and acquiescence involves the idea that the adjacent owner, with knowledge of the line so established and the possession so taken, assents thereto, or that circumstances exist from which assent may be reasonably inferred. *Hausner v. Melia*, 212 Neb. 764, 326 N.W.2d 31 (1982). In order to establish a boundary by acquiescence, it is not necessary that the acquiescence should be manifested by a conventional agreement, but recognition and acquiescence must be mutual, and both parties must have knowledge of the existence of a line as a boundary line. *Id.* Where the owners of adjoining land occupy their respective premises up to a certain line, which they mutually recognize and acquiesce in as the boundary line for a long period of time, there is a presumption in favor of such line being the true one, which can only be overcome by clear proof to the contrary. *Id.* Where such recognition and acquiescence has continued beyond the 10-year period fixed by the statute of limitations, the presumption becomes conclusive. *Id.* Where the true boundary line between adjoining owners of real property can be ascertained, and the parties by mistake have agreed upon an erroneous line as such boundary, believing it to be the true line, they will not be precluded by such agreement from claiming the true line when discovered,

unless the statute of limitations has run or equitable reasons exist for establishing the erroneous line as the true line. *Id.*

10. In this instance, Mrs. Thiede's deposition presents sufficient evidence of assent to the establishment of the boundary line, and defendant Vernon Van Epps' testimony of the directive by Blomstrom to install the fence at that location provides compelling evidence of Blomstrom's assent. The 10-year statute of limitations began to run no later than installation of the fence by the end of April, 1989. Prior to the making of the plaintiffs' written offer to purchase, the ten-year period expired making the presumption conclusive.

11. Similarly, the doctrine of adverse possession supports the defendants' claims. The Supreme Court has frequently restated the applicable principles of law.

a. A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for the statutory period of 10 years. *The Rush Creek Land & Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998). Title cannot be acquired without simultaneous and continuous existence of each element of adverse possession for the required period. *Id.* Where both parties have used the property in dispute, there can be no exclusive possession on the part of one party. *Id.*

b. To gain title by adverse possession against a true owner, acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. *Wiedeman v. James E. Simon Co., Inc.*, 209 Neb. 189, 307 N.W.2d 105 (1981). The sufficiency of possession depends upon the character of the land and the use that can reasonably be made of it. *Id.* When a fence is constructed as a boundary line, although it is not the actual boundary line, and the parties claim ownership of land up to the fence for the uninterrupted statutory period, the claimant gains title to such land by adverse possession. *Id.*

c. One who claims title by adverse possession must prove the elements of adverse possession by a preponderance of the evidence. *Pettis v. Lozier*, 205 Neb. 802, 290 N.W.2d 215 (1980). However, once a person proves uninterrupted and open use for the necessary prescriptive period without evidence to explain how the use began, the presumption is raised that the use is adverse and under claim of right and that presumption prevails until it is overcome by a preponderance of the evidence. *Fischer v. Grinsbergs*, 198 Neb. 329, 252 N.W.2d 619 (1977). A permissive use is not adverse, and cannot ripen into adverse possession. *Id.*

d. The element of a “claim of ownership” or “hostility” has, in Nebraska law, always been required. *Barnes v. Milligan*, 200 Neb. 450, 264 N.W.2d 186 (1978). Usually the “hostility” or “claim of ownership” is evidenced by the nature of the possession, and, in the absence of contrary evidence, that is sufficient to sustain the burden to claim adverse title. *Id.* Of course, nonhostility can be shown even where the nature of the possession is sufficient to give notice of hostility. *Id.* The warning loses its significance if the evidence shows that hostility is not present, because then one of the elements of adverse possession is missing. *Id.* Further, a long line of cases makes it evident that intent has always been an element in Nebraska. *Id.* The intent may be either actual or presumed, or inferred from the circumstances. *Id.* In most cases it is inferred from the circumstances. *Id.* The intent, even though mistaken, is sufficient as where the claimant occupies to the wrong line believing it to be the true line and even though he does not intend to claim more than that described in the deed. *Id.* However, where the claimant was under no misapprehension as to where the true line was and did not intend the fence as a boundary line fence, the occupancy does not ripen into title. The court in *Barnes* concluded that the fence was placed where it was merely as a matter of convenience, at least in part because any fence erected on the true line would have been constructed over very rough land.

12. The evidence establishes all of the elements of adverse possession by the greater weight of the evidence.

13. As the evidence fails to support the plaintiffs' claim, the plaintiffs' petition must be dismissed with prejudice. Because the evidence supports the defendants' counterclaim to quiet title based upon mutual recognition and acquiescence and adverse possession, the defendants' counterclaim must be granted.

14. Neither party submitted any itemization of costs not shown on the court's Justice system as required by the pretrial order. The costs shown on the Justice system are taxed to the plaintiffs. All of those costs were paid or incurred by the plaintiffs except for \$15.75 of costs incurred by defendants. Judgment for costs of \$15.75 will be taxed in favor of defendants and against plaintiffs.

DECREE: IT IS THEREFORE ORDERED, ADJUDGED, AND
DECREED that:

1. Judgment is granted in favor of the defendants, Vernon Van Epps and Jean Van Epps, and against the plaintiffs, Garth D. Carr and Doris M. Carr, dismissing the plaintiffs' petition with prejudice to future action.

2. Judgment is granted on the counterclaim of the defendants, Vernon Van Epps and Jean Van Epps, in favor of the defendants and against the plaintiffs, as follows:

a. The title of the said defendants to a tract of real estate in the East Half of the Southwest Quarter (E $\frac{1}{2}$ SW $\frac{1}{4}$) of Section 10, Township 34 North, Range 21, West of the 6th P.M. in Keya Paha County, Nebraska, specifically described as:

commencing at the southwest corner of the E $\frac{1}{2}$ SW $\frac{1}{4}$, thence north along the west line of the E $\frac{1}{2}$ SW $\frac{1}{4}$ of said Section 10 to the east-west center line of said Section 10, thence east along the east-west center line of said Section 10 a distance of 152.70 feet, thence southerly to a point 166.12 feet east of the southwest corner of the E $\frac{1}{2}$ SW $\frac{1}{4}$ of said Section 10, said point being on the south line of said Section 10, thence west along the south line of said Section 10 a distance of 166.12 feet to the point of beginning,

is quieted and confirmed in the said defendants as against each of the plaintiffs and against all persons having or claiming any interest in said real estate through any one or more of the

plaintiffs, and each of them is hereby enjoined forever from asserting any claim or interest in said real estate or any portion thereof; and,

b. Costs of \$15.75, representing amounts incurred and paid by the defendants are taxed against the plaintiffs, in addition to costs incurred and paid by the plaintiffs.

3. The judgment shall bear interest at the judgment rate of 3.245% per annum from the date of entry until paid.

4. All requests of all parties for attorneys' fees, express or implied, are denied. All claims of all parties not otherwise disposed above are denied. This is a final judgment.

Signed in chambers at **Ainsworth**, Nebraska, on **January 21, 2003**;
DEEMED ENTERED upon file stamp date by court clerk.

BY THE COURT:

If checked, the court clerk shall:



Mail a copy of this order to all counsel of record and any pro se parties.

Done on _____, 20____ by _____.



Note the decision on the trial docket as: [date of filing] **Signed "Judgment and Decree" entered.**

Done on _____, 20____ by _____.



Mail postcard/notice required by § 25-1301.01 within 3 days ("Judgment and Decree entered").

Done on _____, 20____ by _____.



Enter judgment on the judgment record.

Done on _____, 20____ by _____.

Mailed to:

William B. Cassel
District Judge